

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN D. WOODS,

Defendant and Appellant.

B289798

Los Angeles County  
Super. Ct. No. BA462630

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Conviction affirmed; remanded with directions.

Hancock and Spears and Alan E. Spears, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

---

A jury convicted defendant and appellant Kevin D. Woods of assault by means of force likely to produce great bodily injury. The jury found true an allegation that Woods personally inflicted great bodily injury on the victim in the commission of the crime. The trial court struck Woods's strikes and sentenced him to 18 years in the state prison. On appeal, Woods's counsel asks us independently to review the record for arguable issues under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We have done so. We also have read the submission Woods filed on his own behalf. We affirm Woods's conviction but remand the case for the trial court to consider whether to exercise its discretion to strike Woods's serious felony priors under Senate Bill (S.B.) No. 1393.

#### **FACTS AND PROCEDURAL BACKGROUND**

In November 2017 Blanca G. was homeless and living in an alley in Central Los Angeles. She was born in 1950. Blanca had a very brief relationship with Woods; they had been intimate once. Around 9:00 p.m. on November 3, a man named Benny brought Blanca some food and some coffee. Woods approached, grabbed Blanca by her ponytail, and threw her to the ground. Woods hit Blanca in the face with his fist, grabbed her fingers and twisted them, then got on top of her and grabbed her left leg and twisted it. Blanca tried to scream but could not because Woods put his hand on her mouth. Woods told Blanca, "I want to kill you."

Woods started to hit Blanca in the face with his shoes. When he removed his hand from her mouth she called for help. A friend who was "coming to visit" Blanca called the police.

When Los Angeles Police Department Officer Oscar Pelagio and his partner arrived that night, Woods was gone. Pelagio saw injuries to Blanca's face: swelling and bruising above and under her right eye, a laceration to her lip, and blood on her face. Blanca was having trouble standing. Pelagio called an

ambulance but Blanca refused to let the paramedics take her to the hospital.

Blanca could not sleep that night and she was in considerable pain. The next day she asked a friend to call an ambulance. When another LAPD officer, Eduardo Garcia, arrived at the alley with his partner around 7:30 or 8:00 p.m. on November 4, paramedics were already there trying to put Blanca onto a gurney. Blanca was unable to stand. Garcia followed the ambulance to the hospital, where he interviewed Blanca. Police took photos of Blanca on both November 3 and November 4; the prosecutor showed the photos to the jury at trial. According to Blanca, she suffered two broken teeth and a broken crown as well as injuries to her fingers and her knee.

Blanca gave police a description of Woods, his first name, and the location where he lived in the same alley, some distance from where Blanca stayed. Police arrested Woods.

The People charged Woods with inflicting injury on a girlfriend, assault by means of force likely to produce great bodily injury, and criminal threats. The People alleged that Woods personally inflicted great bodily injury on Blanca, and that Blanca was over the ages of 65 and 60 under Penal Code sections 667.9, subdivision (a), and 1203.09, subdivision (f), respectively.<sup>1</sup>

On March 5, 2018, a jury convicted Woods of the assault and found the infliction of great bodily injury allegation true. The jury was unable to reach a unanimous verdict on the special allegations about Blanca's age, as well as on the injury to a girlfriend and criminal threats counts. In a later proceeding, Woods admitted his strike priors for first degree burglary and three counts of second degree robbery. Woods also admitted a

---

<sup>1</sup> Statutory references are to the Penal Code.

number of prison priors, and that he was on felony probation when he committed the offense.

The trial court granted Woods’s *Romero* motion,<sup>2</sup> struck all of his strike priors, and sentenced him to 18 years in the state prison. The court selected the upper term of four years and added three years for the great bodily injury. The court imposed two serious felony priors under section 667, subdivision (a)(1), for five years each, plus one prison prior under section 667.5, subdivision (b), for one additional year. The court struck Woods’s remaining prison priors and dismissed the counts on which the jury could not reach agreement.

We appointed counsel to represent Woods on appeal. After examining the record, counsel filed an opening brief raising no issues and asking this court to review the record independently under *Wende*. We advised Woods he had 30 days to submit personally any issues he wished us to consider. Woods has submitted a 22-page document entitled “Appeal—Grounds.”

We also asked for supplemental briefing on the question of whether—in light of S.B. No. 1393, effective January 1, 2019—we should remand the case for the trial court to consider any motion by Woods to strike either or both of his prior serious felony convictions. We have received and read letter briefs from the Attorney General and Woods’s counsel. The parties agree the case should be remanded for S.B. No. 1393 consideration.

## DISCUSSION

### 1. *Appellate counsel properly found no arguable issues*

We have examined the entire record and are satisfied appellate counsel has fully complied with his responsibilities and

---

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

that no arguable appellate issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110; *Wende, supra*, 25 Cal.3d at p. 443.)

**2. *Woods has not demonstrated that his trial counsel was constitutionally ineffective***

In his submission, Woods argues his trial counsel was constitutionally ineffective. He raises a number of issues, complaining his lawyer (1) moved to continue the trial over his objection, (2) failed to object to photographs of the scene and the victim's injuries the prosecutor showed to the jury, (3) failed to ask the victim about a preexisting injury to her leg, and (4) failed to demand "corroboration" of the victim's testimony about her injuries. Woods also purports to describe various discussions he had with his trial attorney about strategy, the defense expert's opinion, Woods's proposal to subpoena the victim's treating physician, and Woods's decision not to testify.

"A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution." (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) Under either the federal or state constitution, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*)). To establish ineffective assistance, a defendant must satisfy two requirements. (*Id.* at pp. 690-692.)

First, he must show his attorney's conduct was unreasonable "under prevailing professional norms"—that is, that it fell "outside the wide range of professionally competent assistance." (*Strickland, supra*, 466 U.S. at pp. 688, 690.) This requires him to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment.” (*Id.* at p. 687.) “ ‘In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny . . . ’ and must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Next, the defendant must demonstrate that the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel’s failings, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at pp. 687 [defendant must show “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”], 694.) “It is not sufficient to show the alleged errors may have had some conceivable effect on the trial’s outcome; the defendant must demonstrate a ‘reasonable probability’ that absent the errors the result would have been different.” (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

Claims of ineffectiveness must usually be “raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel’s reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform” the inquiry. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) “There may be cases in which trial counsel’s ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate

court *sua sponte*.” (*Massaro v. United States* (2003) 538 U.S. 500, 508.) But those cases are rare.

Usually, if “the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.” (*People v. Scott, supra*, 15 Cal.4th at p. 1212.) These arguments should instead be raised on collateral review. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Woods has failed to demonstrate any serious error by his trial counsel, much less prejudice. Counsel moved for a continuance on January 23, 2018, because she recently had received “an extensive amount of discovery,” she had submitted a motion for appointment of an expert on the great bodily injury allegation,<sup>3</sup> she had “extensive body cam [footage] to review,” and she was awaiting an offer from the prosecution (other than the life sentence Woods faced in his third-strike case).<sup>4</sup>

Woods also contends his trial counsel should have objected to some exhibits the prosecutor offered. But a decision not to object to testimony or exhibits “comes within [the] broad range of

---

<sup>3</sup> Woods is under the misimpression that his lawyer would “share” the expert’s report with the prosecutor. Defense counsel would give the expert’s name and his report to the prosecutor only if she decided to call him as a witness at trial. (§ 1054.3, subd. (a)(1).) Woods himself admits the defense expert’s opinion about the great bodily injury allegation was “inconclusive.” That, presumably, is why trial counsel ultimately chose not to call him as a witness.

<sup>4</sup> Woods says he refused to waive time because he “wanted to see if the other side would make an offer.” He then states however, that the prosecutor offered him 12 years and he rejected that offer.

trial tactics that we may not second-guess.” (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) “[C]ompetent counsel may often choose to forgo even a valid objection. ‘[I]n the heat of a trial, defense counsel is best able to determine proper tactics . . . not ordinarily reviewable on appeal.’” (*Ibid.*) The exhibits in question included photographs of the alley where the assault took place and photographs responding police officers took of the victim’s injuries. Any objection to those photographs would have been meritless.

Finally, any ineffective assistance claims based on discussions Woods had with his trial counsel—discussions that of course are not in the record before us—must be raised (if at all) in a habeas corpus proceeding. (*People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

**3. *The Attorney General concedes the case must be remanded for the trial court to consider any motion by Woods to strike his serious felony priors***

As noted, in sentencing Woods, the trial court imposed two five-year section 667, subdivision (a)(1) prior serious felony enhancements. At the time, trial courts had no authority to strike a serious felony prior. (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) S.B. No. 1393, which took effect on January 1, 2019, removed that prohibition. The Attorney General concedes the new law applies retroactively to Woods, whose case is not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; *In re Estrada* (1965) 63 Cal.2d 740.) Accordingly, the Attorney General states “[t]his Court should remand the case for the trial court to exercise its discretion to strike or retain [Woods’s] prior serious felony convictions.” We agree.

We offer no view on how the trial court should exercise its discretion. As noted, the trial court already struck Woods’s four



strike priors. In a thoughtful written opinion, the trial court found Woods to be “a violent career criminal with little hope of reform.” The court observed that, while Woods’s strikes were somewhat remote in time, Woods had “continued to commit predatory crimes right up until the instant offense, interrupted only by lengthy prison sentences of 12 and 14 years, as well as a number of other less onerous prison sentences.” Nevertheless, the court granted Woods’s *Romero* motion based on his age, noting he “will be well past 60 years of age when released and, statistically speaking, is unlikely to commit further predatory offenses.”

#### **DISPOSITION**

We affirm Kevin D. Woods’s conviction. We remand the matter to the trial court for the court to exercise its discretion under Senate Bill No. 1393 in response to any motion Woods may file to strike one or both of his prior serious felony convictions.

#### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.